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Koh Choo Meng v Public Prosecutor

B HIGH COURT (MUAR) — APPEAL NOS JB-42S-4–10 OF 2021, JB-42S-5–10 OF 2021, JB-42S-6–10 OF 2021, JB-42S-7–10 OF 2021, JB-42S-8–10 OF 2021, JB-42S-9–10 OF 2021 AND JB-42S-10–10 OF 2021
SURIA KUMAR JC
4 JULY 2023

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether grounds raised by appellant to challenge convictions had no merit — Whether convictions were safe — Whether court considered appeal against sentences to have been abandoned as no grounds were raised nor submissions made in respect of them

D

The sessions court found the appellant guilty of a charge of theft of his company's property under s 381 of the Penal Code ('the PC') — for which he was sentenced to two years' jail — and 18 charges of disposing of stolen property under s 414 of the PC — for which he was sentenced on each charge to two years' jail and fined RM1,000 in default three months' jail. The instant appeals were against conviction and sentence. At the time the offences were committed, the appellant was employed as an assistant supervisor in the production department of a company that manufactured aluminium products and bifold doors ('the company'). The s 381 charge stated that the appellant had committed theft of the company's aluminium materials between January and February of 2019. The 18 charges under s 414 stated that he had disposed of aluminium materials belonging to the company, and which he had reason to believe were stolen property, by selling them off to a recycling factory ('Hup Huat') on 18 occasions over 11 months between 2018 and 2019. In convicting the appellant, the trial judge found that without the company's knowledge or consent, the appellant had requisitioned for increasing quantities of two specific types of aluminium materials to be sent from the company's store to the production area where they were then cut up, mixed with other discarded items and sent to the recycling bay from where they were loaded onto a lorry to be transported to Hup Huat. Thereafter, the appellant kept the proceeds of sale. The evidence showed that the appellant had single-handedly arranged the entire procedure for the materials to leave the company's premises and end up at Hup Huat.

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Held, dismissing the appeals and affirming the convictions and sentences:

(1) The trial judge had correctly found from the evidence that the appellant had acted dishonestly in making his own arrangements to remove the aluminium materials belonging to the company from its premises and to sell them to Hup Huat and to keep the proceeds of sale without the company's knowledge or consent. The evidence adduced by the prosecution supported the findings of the trial judge (see paras 60–65).

(2) As a ground of appeal, the appellant accused his counsel at the trial of being flagrantly incompetent in, among other things, failing to call a Myanmar employee of the company, Min Tun (who had since returned to his homeland) and an Ah Xiang who was the person the company's director, PW10, regularly dealt with in disposing of unwanted materials for recycling. The appellant had failed to show how the testimonies of Min Tun or Ah Xiang would have assisted his case. In all probability, they would have only strengthened the prosecution's case. As such, it could not be said that his counsel was flagrantly incompetent in failing to call them to testify. It was also alleged that counsel failed to cross-examine PW10 and to have put the defence's case to him at the prosecution stage. On the facts and evidence, there was a strong possibility that PW10 would not have been easily challenged in cross-examination and that the evidence he would have given would only have strengthened the prosecution's case. Counsel must have weighed all pros and cons before he decided on the course of action that he took (see paras 67–70 & 76–89).

(3) The trial judge did not err in not invoking adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for not calling Min Tun and Ah Xiang to testify. Min Tun had returned to his home country eight months before the trial started and the relevant evidence he would have given in relation to the material requisition form was proven through other witnesses, mainly PW3 and PW6. As for Ah Xiang, there was no necessity for the prosecution to have called him as PW10's evidence sufficiently established the company's normal practice of disposing of its unwanted or rejected aluminium materials for recycling (see paras 91, 95–97 & 106).

(4) There was no requirement in law that the s 381 of the Penal Code offence must have been proven first in order to establish the s 414 offence (see para 123).

(5) The appellant's convictions were safe. Although the appeals were also against sentence, no grounds were raised or submissions made in respect of them. As such, the court regarded the appeal against sentence to have been abandoned (see paras 126–127).

[Bahasa Malaysia summary

Mahkamah sesyen mendapati perayu bersalah atas pertuduhan mencuri harta syarikatnya di bawah s 381 Kanun Keseksaan ('KK') — yang mana beliau telah dijatuhi hukuman penjara dua tahun — dan 18 pertuduhan menghapuskan harta curi di bawah s 414 KK — yang mana beliau dijatuhkan hukuman bagi setiap pertuduhan penjara dua tahun dan denda RM1,000 jika gagal penjara tiga bulan. Rayuan semasa adalah terhadap sabitan dan hukuman. Pada masa kesalahan dilakukan, perayu telah bekerja sebagai penolong penyelia di jabatan pengeluaran sebuah syarikat yang membuat produk aluminium dan pintu lipat (*bifold*) ('syarikat tersebut'). Pertuduhan s 381 menyatakan perayu telah mencuri bahan aluminium syarikat antara Januari dan Februari 2019. 18 pertuduhan di bawah s 414 menyatakan bahawa beliau telah menghapuskan bahan aluminium milik syarikat tersebut, dan yang mana beliau mempunyai sebab untuk percaya bahawa adalah harta curi, dengan menjualnya kepada kilang kitar semula ('Hup Huat') sebanyak 18 kali dalam tempoh 11 bulan antara 2018 dan 2019. Dalam mensabitkan perayu, hakim perbicaraan mendapati bahawa tanpa pengetahuan atau kebenaran syarikat, perayu telah membuat permohonan untuk menambah kuantiti dua jenis bahan aluminium tertentu untuk dihantar dari stor syarikat ke kawasan pengeluaran di mana ia kemudiannya dipotong, dicampur dengan barang terbuang lain dan dihantar ke ruang kitar semula dari tempat ia dimuatkan ke sebuah lori untuk diangkut ke Hup Huat. Selepas itu, perayu menyimpan hasil jualan. Keterangan menunjukkan perayu telah secara sendirian mengatur keseluruhan prosedur untuk bahan tersebut keluar dari premis syarikat dan ke Hup Huat.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Hakim perbicara telah dengan tepat membuat dapatan daripada keterangan bahawa perayu telah bertindak secara tidak jujur dalam membuat aturan sendiri untuk mengeluarkan bahan aluminium kepunyaan syarikat dari premisnya dan menjualnya kepada Hup Huat dan menyimpan hasil jualan tanpa pengetahuan atau kebenaran syarikat. Keterangan yang dikemukakan oleh pihak pendakwaan menyokong dapatan hakim perbicaraan (lihat perenggan 60–65).

(2) Sebagai alasan rayuan, perayu menuduh peguamnya semasa perbicaraan secara terang-terangan tidak cekap dalam, antara lain, gagal menghubungi seorang pekerja syarikat Myanmar, Min Tun (yang telah pulang ke tanah airnya) dan Ah Xiang yang merupakan pengarah syarikat, PW10, yang selalu berurusan dengan melupuskan bahan yang tidak diingini untuk dikitar semula. Perayu telah gagal untuk menunjukkan bagaimana keterangan Min Tun atau Ah Xiang akan membantu kesnya. Dalam semua kebarangkalian, mereka hanya akan menguatkan kes pendakwaan. Oleh itu, tidak boleh dikatakan bahawa

peguamnya secara terang-terangan tidak cekap kerana gagal memanggil mereka untuk memberi keterangan. Ia juga didakwa bahawa peguam gagal menyoal balas PW10 dan telah meletakkan kes pembelaan kepadanya di peringkat pendakwaan. Mengenai fakta dan keterangan, terdapat kemungkinan besar bahawa PW10 tidak akan mudah dicabar dalam pemeriksaan balas dan keterangan yang akan diberikannya hanya akan menguatkan kes pendakwaan. Peguam mesti telah menimbang semua kebaikan dan keburukan sebelum beliau memutuskan tindakan yang diambilnya (lihat perenggan 67–70 & 76–89).

(3) Hakim bicara tidak terkhilaf kerana tidak menggunapakai anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan kerana tidak memanggil Min Tun dan Ah Xiang untuk memberi keterangan. Min Tun telah pulang ke negara asalnya lapan bulan sebelum perbicaraan bermula dan keterangan berkaitan yang akan diberikannya berhubung borang permintaan bahan telah dibuktikan melalui saksi lain, terutamanya PW3 dan PW6. Bagi Ah Xiang, tidak ada keperluan untuk pihak pendakwaan memanggilnya kerana keterangan PW10 cukup membuktikan amalan biasa syarikat melupuskan bahan aluminium yang tidak diingini atau ditolak untuk dikitar semula (lihat perenggan 91, 95–97 & 106).

(4) Tiada keperluan dalam undang-undang bahawa kesalahan s 381 Kanun Keseksaan mestilah dibuktikan terlebih dahulu untuk membuktikan kesalahan s 414 (lihat perenggan 123).

(5) Sabitan perayu dikekalkan. Walaupun rayuan juga adalah terhadap hukuman, tiada alasan dibangkitkan atau hujahan dibuat berkenaannya. Oleh yang demikian, mahkamah menganggap rayuan terhadap hukuman telah ditinggalkan (lihat perenggan 126–127).]

Cases referred to

Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
Hastimal Asaldas v The State of Gujarat 1975 CriLJ 983, HC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209; [1969] 1 LNS 52, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84; [1980] 1 LNS 197, FC (refd)
Mohammad Jobi Ullah v PP [2022] MLJU 1209; [2022] 9 CLJ 37, CA (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Rosli bin Yusof v PP [2021] 4 MLJ 479; [2021] 7 CLJ 681, FC (folld)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Yahya Hussein Mohsen Abdulrab v PP [2021] 5 MLJ 811; [2021] 9 CLJ 414, FC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)
Penal Code ss 378, 381, 414

Lee Cho Kang (with Aishah Nurfitri) (Haeme Lew) for the appellant.
Ummy Amira Natasha bt Azhar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suria Kumar JC:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions judge on 13 October 2021 by the accused against his conviction and sentence.

[2] The accused was found guilty and convicted on one amended charge under s 381 of the Penal Code and sentenced to two years imprisonment from date of sentence.

[3] The accused was also found guilty and convicted on 18 amended charges under s 414 of the Penal Code and sentenced to two years imprisonment from date of sentence and fined RM1,000 in default three months imprisonment for each of the charges.

[4] The sentences under s 414 were ordered to run concurrently whereas the sentence under s 381 was ordered to run consecutively.

[5] The accused will be referred to as the appellant in the judgment herein.

BACKGROUND FACTS

[6] Vitally Sdn Bhd is a company which deals in manufacturing aluminium products and bifold doors ('the company').

[7] The appellant was employed by the company as an assistant supervisor at the Production Department.

[8] The company has two stores. The main store where aluminium materials from the suppliers are kept and sub store where aluminium materials which is moved from the main store on request for production are kept.

[9] The records pertaining to movement of the aluminium materials from the main store to the sub store is stored in a UBS system kept by the company's employee, PW2.

[10] The request for aluminium materials using a 'Material Requisition Form' (exh P1 A-N) will be made by the senior operators from the sub store.

[11] PW1, the senior storekeeper will then look for and arrange the aluminium materials requested by the sub store, place a sticker on it and hand it over to the senior operators ie PW3 or an employee called Min Tun who has returned to Myanmar and no longer with the company.

[12] PW1 as the storekeeper will have no knowledge the purpose for which the aluminium materials are requested for by the senior operators from the sub store.

[13] The above explains the movement of the aluminium materials in the company from the main store to the sub store in the course of the company's daily operations.

[14] Sometime in the middle of February, 2019 the company noticed there was a significant shortage in the quantity of aluminium materials type 31318 and 31905.

[15] The company then conducted an internal investigation by interviewing their employees, checking their records and CCTV recordings. The company found the appellant had committed theft of the missing aluminium materials and disposed it to a third party. The losses were assessed to be approximately RM100,000.

[16] Thereafter the company lodged a police report against the appellant through PW11, the corporate affairs manager upon instructed to do so by PW10, one of the directors of the company.

[17] The appellant was arrested and police investigations concluded with the appellant being charged for theft from his employer and disposing stolen aluminium materials belonging to the company.

[18] The subject matter of theft and disposing stolen goods comprises of unwanted or rejected aluminium materials for recycling and new aluminium materials which was cut into two pieces measuring 83 inches.

CHARGES AGAINST THE ACCUSED AND ELEMENTS OF THE OFFENCE.

[19] The amended charge pursuant to s 381 of the Penal Code against the accused reads as follows:

Pertuduhan pindaan seksyen 381 Kanun Keseksaan

Bahawa kamu pada bulan Januari tahun 2019 sehingga bulan Februari 2019, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor, sebagai pekerja Kilang Vitally Sdn Bhd, telah didapati mencuri bahan-bahan aluminium milik majikan kamu iaitu Syarikat Vitally Sdn Bhd. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 391 Kanun Keseksaan.

Hukuman

Hendaklah dihukum dengan pemenjaraan selama tempoh yang boleh sampai tujuh tahun dan hendaklah juga dikenakan denda.

[20] For easy reference, s 381 Penal Code is reproduced below:

381 Theft by clerk or servant of property in possession of master

Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

[21] The commentary in *Ratanlal & Dhirajlal's Law of Crimes* states that for an offence under s 381 of the Penal Code, the prosecution must prove the following:

(a) that the property in question is movable property;

(b) that such property was in the possession of a person;

(c) that the accused moved such property whilst in the possession of that person;

(d) that he did so without the consent of that person;

(e) that he did so in order to take the same out of the possession of that person;

(f) that he did so with intent to cause wrongful loss to that person or wrongful gain to himself;

(g) that property was at the time of the theft in a building, tent or vessel. All that is necessary is that the property should be under the protection of the building; it is not necessary to show unlawful entrance into the building; and

(h) that such building, tent or vessel, was then being used as a human dwelling or for the custody of property.

[22] The 18 amended charges pursuant to s 414 of the Penal Code is produced below:

I. PERBICARAAN JENAYAH NO.: JB-62-22-06/2019 SEKSYEN 414 KANUN KESEKSAAN

Pertuduhan pindaan pertama

Bahawa kamu pada 12/02/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 30/04/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 07/06/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Hukuman

Hendaklah dihukum dengan pemenjaraan selama tempoh yang boleh sampai tujuh tahun, atau dengan denda, atau dengan kedua-duanya.

II. PERBICARAAN JENAYAH NO.: JB-62-23-06/2019 seksyen 414 Kanun Keseksaan

Pertuduhan pindaan pertama

Bahawa kamu pada 03/07/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 17/07/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal Di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 01/08/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

III. PERBICARAAN JENAYAH NO.: JB-62-24-06/2019 SEKSYEN 414 KANUN KESEKSAAN

Pertuduhan pindaan pertama

Bahawa kamu pada 29/08/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor Telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd Dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 26/09/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 13/10/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah

melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

IV. PERBICARAAN JENAYAH NO.: JB-62-25-06/2019 SEKSYEN 414 KANUN KESEKSAAN

Pertuduhan pindaan pertama

Bahawa kamu pada 31/10/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 08/11/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 22/11/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

V. PERBICARAAN JENAYAH NO.: JB-62-26-06/2019 SEKSYEN 414 KANUN KESEKSAAN

Pertuduhan pindaan pertama

Bahawa kamu pada 05/12/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 19/12/2018, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 08/01/2019, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

VI. PERBICARAAN JENAYAH NO.: JB-62-27-06/2019 SEKSYEN 414 KANUN KESEKSAAN

Pertuduhan pindaan pertama

Bahawa kamu pada 15/01/2019, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan kedua

Bahawa kamu pada 23/01/2019, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan pindaan ketiga

Bahawa kamu pada 27/02/2019, bertempat di Kilang Vitally Sdn Bhd, Bukit Treh, di dalam Daerah Muar, di dalam Negeri Johor telah didapati menghapuskan harta curi iaitu bahan-bahan aluminium milik Kilang Vitally Sdn Bhd dengan cara menjual harta tersebut kepada sebuah kilang recycle iaitu Hup Huat Scrap Metal di Batu Pahat, Johor, dimana kamu mempunyai sebab untuk mempercayai bahawa bahan aluminium tersebut sebagai harta curi. Oleh yang demikian kamu telah

melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

[23] For easy reference, s 414 is reproduced below:

> 414 Assisting in concealment of stolen property
>
> Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both; and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A, shall be punished with imprisonment for a term of not less than six months and not more than seven years, and shall also be liable to fine.

[24] The commentary in *Ratanlal & Dhirajlal's Law of Crimes* states that for an offence under s 414 of the Penal Code, the prosecution must prove the following:

(i) that the property in question is stolen property;

(ii) that the accused assisted in concealing or disposing of, or making away with, such property;

This section does not impose on the prosecution the requirement that it should in all cases trace the owners of the property stolen. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property;

(iii) that he did as in (ii) voluntarily; and

(iv) that he knew or had reason to believe that the property was stolen property.

FINDINGS BY THE TRIAL JUDGE

[25] The prosecution called 12 witnesses comprising of the company's employees, the transporter of the stolen aluminium materials engaged by the appellant, the buyer of these stolen aluminium materials and the Investigation Officer.

[26] The learned sessions judge found at the end of prosecution's case, a prima facie case was made out and the appellant was called upon to enter his defence.

[27] The appellant gave evidence under oath and was the sole witness.

[28] At the end of the defence case, the learned sessions judge found upon

maximum evaluation of the evidence adduced, prosecution had proven all the amended charges against the accused beyond reasonable doubt and the defence failed to raise any reasonable doubt.

[29] In arriving at his decision, the learned sessions judge found the evidence adduced through the prosecution's witnesses comprising of the company's employees, its director, the transporter engaged by the appellant and the buyer of the aluminium materials considered as a whole disclosed an activity which was out of the company's norm took place.

[30] His findings and inferences based on the totality of the evidence as a whole from the company's employees ie PW1, PW2, PW3, PW5, PW6, PW7, PW9, PW11, its director PW10, the transporter, PW4 and the buyer, PW8 can be summarised as follows:

(a) requests was made by appellant to the senior operators in the sub store for larger quantity of aluminium materials in the name of the company's director (PW10) as though the request came from the big boss;

(b) the type of aluminium materials requested was 31318 and 31905;

(c) movement of the aluminium materials from the main store to the sub store and thereafter to the cutting area and recycling bay;

(d) the cutting of the aluminium in bundles into two which was not in accordance with the company's norm wherein it is normally cut into loose pieces;

(e) thereafter transporting the same out of company's premise by using PW4's lorry each time;

(f) appellant himself opening the back entrance gate each time for PW4's lorry to enter the company's premise;

(g) CCTV recording (exh P4 (1-19)-CD) showing someone resembling the appellant's figure opening the back-entrance gate for PW4's lorry to enter the company's premise;

(h) making use of the company's foreign workers to load the aluminium materials together with unwanted or rejected aluminium placed at the recycling bay onto PW4's lorry;

(i) PW4 transporting the same to be sold to PW8's factory ie Kilang Hup Huat Scrap Centre in Batu Pahat;

(j) the company only disposes the unwanted or rejected aluminium materials to Sykt Ee Fatt that comes to collect the unwanted or rejected aluminium for recycling by using different sizes lorry once in every two months;

(k) appellant selling the same to PW8's factory without the company's consent or knowledge;

(l) aluminium measuring 10 feet long wrapped in paper and plastic were sold together with small pieces of aluminium placed in a gunny sack by the appellant to PW8's factory; and

(m) sale proceeds paid to appellant and not forwarded to the company.

[31] In short, the admitted facts prove that appellant in his position as the assistant supervisor at the Production Department made use of the company's employees from the main store and sub store to move the aluminium materials out of the company's premise after it was cut into two by placing it together with the unwanted or discarded aluminium materials at the recycling bay. Thereafter he got it transported out of the company's premise and delivered it to a recycling factory. He sold it to the recycling factory and kept the proceeds.

[32] Finally, the learned sessions judge found that for purposes of proving the charges, it did not matter whether the appellant disposed aluminium that were rejected, discarded or unwanted or new aluminium materials that was yet to be used.

PRINCIPLES OF APPELLATE INTERVENTION

[33] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] 1 LNS 52, in respect of credibility of witnesses in criminal appeals, it was held by the Federal Court as follows:

> ... This view of the trial judge as to the credibility of the witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding ...

[34] Whereas in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; [1980] 1 LNS 197 in respect of findings by a trial judge in a criminal trial, it was held by the Federal Court as follows:

> ... The principle of law governing appeals in criminal cases on questions of fact is well established, in that the appeal court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.
>
> In the instant case the learned trial judge very carefully analysed all the available evidence before him and made specific findings of fact founded upon that which he believed to be the truth. *He also drew certain inferences from facts specifically found. In this respect we may form our independent view but we should only do so where the fact*

A *upon which the inference was drawn was either unwarranted or manifestly against the weight of evidence.* That was not the case here. In considering the appeal before us we gave very careful consideration to submissions made by Mr Manjit Singh, counsel for the first appellant, and Encik Radzi, counsel for second, third and fourth appellants. In our judgment there was no merit in the argument and we were in full B agreement with the findings of the learned trial judge. We therefore dismissed the appeal against conviction ... (Emphasis added.)

[35] Whereas in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, in respect of the approach to be adopted in a criminal C appeal, the Court of Appeal held as follows:

... Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. *The correct approach is therefore not whether the decision is wrong but whether the conviction is safe.* See *Mohammad Husain* D *v Emperor* AIR 1945 Nag 441, *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160; [1977] 1 LNS 162. That question, on the present facts, must receive a negative response ... (Emphasis added.)

E **[36]** The appellant in the present appeal has raised several grounds of appeal attacking the learned sessions judge's decision. I shall deal with each of the grounds below.

[37] The seven appeals were heard together and this ground of judgment is F in respect of all seven appeals.

GROUND NO 1

[38] Learned counsel for the appellant submits that prosecution needs to G prove three elements in a charge under s 381 of the Penal Code and one of these element is theft as defined in s 378 of the Penal Code.

[39] According to learned counsel for the appellant, prosecution has failed to prove the aluminium materials were dishonestly moved from the employer H without the consent of the employer.

[40] He contends that the aluminium materials were moved with the consent of the employer and there is no dishonesty on the part of the appellant.

I **[41]** In making his submission, learned counsel for the appellant contends that the learned sessions judge has failed to consider that the sale transaction of the aluminium materials between PW8 and the appellant was in the course of the appellant discharging his duties to dispose the discarded, unwanted or old aluminium materials for recycling.

[42] The appellant contends that these aluminium materials were discarded, unwanted or old ones and is no longer needed by the company and the company had instructed him to dispose these materials. As such, the appellant was only carrying out the company's instruction by selling these aluminium materials to Kilang Hup Huat Scrap Centre for recycling and therefore is no element of dishonesty on his part.

[43] The learned sessions judge found the aluminium materials which is subject matter of the charges were disposed by the appellant to PW8's factory.

[44] He also found that the appellant had engaged PW4 to provide transportation of the aluminium materials to PW8's factory by using the lorry bearing registration number JFY 8535 entering through the back-entrance gate which will be opened by the appellant himself. He further found that each time, the same lorry came to transport the aluminium materials.

[45] This practice was not the usual company's modus on how the discarded or unwanted aluminium materials disposed for recycling.

[46] The learned sessions judge found from PW3 and PW10's evidence that the company will only dispose aluminium materials once in every two months when there is sufficient quantity placed at the recycling bay. He further found, it is PW10 who attends to disposing of these discarded aluminium materials for recycling upon being notified by the appellant when there is sufficient aluminium materials for recycling. PW10 will then contact one Ah Xiang from Sykt Ee Fatt and Ah Xiang who normally bring different sizes lorry that is bigger than PW4's lorry to collect the aluminium materials. PW10 also testified that he has been dealing with Ah Xiang for more than five years and never dealt with anyone else to dispose the unwanted, discarded or rejected aluminium materials and continues to deal with Ah Xiang for recycling of these materials.

[47] The company's evidence on how the discarded or unwanted aluminium materials is disposed materially differs from how the appellant disposed these materials to PW8.

[48] In addition, according to the testimony of PW3, the aluminium which was placed outside the factory at the recycling bay were not rejected ones but there was new one's type 31318 and 31905. These new ones were ordered by the appellant to be cut into two and left at the recycling bay for collection by the lorry driven by PW4 coming from the back-entrance gate which was opened by the appellant.

[49] PW3 also testified that it is the appellant who instructed the lorry to

A enter the factory through the back-entrance gate to collect these aluminium materials and the gate will only be opened by the appellant.

[50] PW4, the proprietor of Sykt Save N Care Enterprise as evidenced by exh P5 is involved in transportation business. PW4 testified that his business
B owns a lorry with registration number JFY 8535 as evidenced by exh P7. PW4 further testified that appellant engaged his services to transport the aluminium materials from Sykt Vitally Sdn Bhd to PW8's recycling factory, Kilang Hup Huat Scrapp Centre in Batu Pahat.

C **[51]** PW4 further testified the appellant used his services from February, 2018 until the month of February 2019 and was paid by the appellant RM250 for each trip to PW8's factory. According to PW4, appellant asked him to issue receipts in favour of the company, Sykt Vitally Sdn Bhd (exh P6 A-S). PW4 also confirmed that he never dealt with anybody else from Sykt Vitally Sdn Bhd
D apart from the appellant.

[52] PW4 also testified that appellant directed him to collect the aluminium materials from the company by entering through the back-entrance gate which
E will be opened by the appellant himself. According to PW4, upon entering the factory premise, his lorry will be parked near the bay for recycled materials and the company's foreign workers will load the aluminium materials onto his lorry. He will then drive out using the back entrance of the factory and deliver it to Kilang Hup Huat Scrap Centre at Minyak Beku, Batu Pahat on the next day.

F **[53]** At PW8's recycling factory, PW4 will wait for the aluminium materials to be unloaded and to be weighed. Thereafter he will WhatsApp to the appellant the paper on which the weight of these materials is recorded.

G **[54]** PW8, one of the proprietors of Kilang Hup Huat Scrap Centre testified that he dealt with the appellant from the period February 2018 to February 2019. According to PW8, appellant represented to him that the company, Sykt Vitally is a partnership owned by him together with others and is involved in the business of aluminium products. PW8 further said that the appellant told
H him that he had unwanted aluminium materials to be sold and asked for his quotation.

[55] PW8 also testified that the appellant agreed to his quote and the aluminium that was sold by the appellant is around 10 feet long and wrapped
I with plastic or paper. There were also aluminium materials in small cut sizes. A transaction slip which shows the number of deliveries made by PW4 to PW8's factory with the lorry registration number JFY 8535 was produced as exh P10.

[56] Purchase bills were issued for the purchases of these aluminium

materials by PW8's factory (exh P9 A-R). Some were issued in favour of the appellant's name and in some it was just stated as cash. PW8 also testified that the appellant did not want the said purchase bills to be issued in the name of the company to avoid paying tax for the sales proceeds.

[57] Lastly, PW8 also said that some payments were made to the appellants via cheque as evidenced by exh P12 A-K.

[58] I am of the considered view that the learned sessions judge had arrived at the correct conclusion that the company's evidence on how the unwanted, rejected or discarded aluminium materials is disposed materially differs from how the appellant disposed these aluminium materials to PW8 based on the totality of evidence.

[59] As such, the appellant's contention that he was dealing in these aluminium materials with the consent from the company or PW10 in the course of his duties as the company's employee to dispose these materials is not true and was rightly rejected by the learned sessions judge.

[60] Based on the evidence adduced by the prosecution, I find that the learned sessions judge had correctly found that appellant had dishonestly moved the aluminium materials from the factory, got it transported to a recycling factory with the intention of disposing it and benefiting from the same, without the consent from the company. The evidence adduced by the prosecution supports the findings made by the learned sessions judge.

[61] Furthermore, appellant failed to produce any evidence of consent from PW10 or from the company authorising him to make arrangement to dispose these aluminium materials as contended by him.

[62] Evidence shows that appellant had acted single-handedly in making the arrangement to dispose the aluminium materials for recycling without the company's knowledge and consent.

[63] This is further corroborated by the purchase bills (exh P9 A-R) issued by PW8's recycling factory not in favour of the company but in favour of the appellant or just stated as cash.

[64] The payments for disposing these items was also received solely by the appellant as testified by PW8 and evidenced by P12 (A-K) , was kept by him and never forwarded to the company.

[65] As such, I find the learned sessions judge had correctly found that the appellant had moved these aluminium materials from the company's premise with the intention of taking it dishonestly without the consent of the company

[66] In the premise, I find no merit in in this ground of appeal.

GROUND NO 2

[67] Next, appellant raises the ground that his counsel being incompetent during the trial at the sessions court.

[68] Learned counsel for the appellant in the High Court submits that the appellant's counsel at the sessions court was incompetent when he failed to cross-examine one of the prosecution witnesses ie PW10, to put the defence case during the prosecution stage and to call any witness during the defence stage.

[69] According to learned counsel for the appellant in the High Court, the appellant had intended to call one Min Tun, an employee of the company who is a Myanmar national but had returned to his home country and Ah Xiang, the person who PW10 normally deals with in respect of the aluminium materials for recycling. However, the appellant's wishes was not considered at all by his counsel in the sessions court.

[70] The appellant also submits that his counsel in the sessions court failed to put to PW10 that the appellant sold the recycled aluminium materials on PW10's instruction and also failed to cross-examine PW10 on the cheques issued by Kilang Hup Huat Scrap Centre for the sale of aluminium materials for recycling by the accused.

[71] In support of his submission, learned counsel for the appellant in the High Court relies on Federal Court's decision in *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414 wherein Her Ladyship Tengku Maimun Tuan Mat, the Chief Justice of Malaysia held as follows:

> [43] At this juncture, it is safe to say that it is not unheard of (at least conceptually) for courts to set aside convictions by finding that there was an unfair trial on the ground that counsel was flagrantly incompetent such that effectively, there was no right to counsel. *In other words, based on a series of decided cases, where the conduct of the counsel in the trial process gives rise to a miscarriage of justice, it is incumbent upon the court to set aside the conviction.*
>
> [44] Taking heed from high authorities, the test in all cases when considering whether there was a breach of fair trial as a result of incompetent counsel is to ask the question whether the incompetency was flagrant, such that it caused or gave rise to

a miscarriage of justice. As explained by McHugh J in *TKWJ*:

> A test such as 'flagrant incompetent', while a convenient label may show that a miscarriage of justice has occurred in a particular case, is unhelpful in determining whether there has been a miscarriage of justice within the terms of s 6(1) of the Criminal Appeal Act. Whether there has been a miscarriage of justice is the ultimate issue that the court must decide.

Thus, the focus of the inquiry by the court is not on the advocacy skills or performance of trial counsel, rather it is the acts or omissions themselves as they impact on the fairness of the trial and whether the result constitute a miscarriage of justice.

[45] In this regard, those of us in the legal profession must recognise that there is a large influx of members of the Bar. Some are obviously more renowned than others for various reasons such as advanced experience and general access to information and network. There will always be the case where an accused person is dissatisfied with the standard of advocacy of his counsel. However, where counsel fails to abide by certain standards or does something another lawyer would have done differently, the accused or litigant's recourse is to the disciplinary or complaints mechanism established by law — or perhaps write a bad review. He is not otherwise entitled to use subjective or perceived notions of incompetency as a reason to complain about his conviction.

[46] Be that as it may, in extreme cases, assessed objectively, where counsel has acted far below the accepted standard such that his flagrant incompetency jeopardises the accused person's right to a fair trial, the overall purpose of art 5(1) of the Federal Constitution — which is to deprive life or personal liberty only according to law — would be rendered illusory. As such, in those circumstances, the just thing to do would be to set aside the conviction.

[47] At this point, what remains to be addressed is our reasons for agreeing with the Court of Appeal to the extent that the appellant's counsel was flagrantly incompetent such that the conviction ought to have been set aside and our reasons for departing from the decision of the Court of Appeal on the retrial.

[48] On an objective assessment of the additional evidence, we found that the Court of Appeal was correct to hold that the appellant's counsel was flagrantly incompetent occasioning in a miscarriage of justice to the appellant based on the following.

[49] Firstly, *the appellant would only be addressing the court as to his defence during the defence's case. During the defence's case, the appellant revealed for the first time the fact of Mickey and the entire transaction involving him. The JC found that the appellant's narrative was an afterthought invented to support his testimony during the defence's case as this was never put in cross-examination during the prosecution's case. At the prosecution's case, it was the duty of his counsel to effectively cross-examine the prosecution's witnesses, which his counsel failed to do. The overall impression created in the mind of the JC arose as a result of counsel's failure to cross-examine the prosecution's witnesses as he should and to lead evidence of the defence on this fact.*

[50] Secondly, and following from the first, *the appellant's counsel refused generally to consider the appellant's narrative and instead chose to mount another defence for him*, namely, the discrepancy in the weight of the drugs. The learned JC correctly found

that the discrepancy in itself is not a sufficient ground to cast reasonable doubt on the prosecution's case. *The appellant's counsel avoided advancing the appellant's actual narrative which would have stood a better chance of exonerating him.*

[51] *Thirdly, and further on the point of exonerating evidence, the appellant was the only witness who was called.* In the appellant's evidence, he denied having knowledge of the dangerous drugs and to support that assertion, he further posited the defence that Mickey packed his bag for him. The JC disbelieved this for the questionable reason that the appellant's wife should have logically packed the bag for him. The learned JC would have perhaps arrived at a different conclusion if there was evidence before him on the fact that Mickey was not just some random stranger but was known to the appellant because Mickey was the appellant's wife, DW2's brother-in-law. To this effect, DW2 made her way to the court in Tawau to testify but the appellant's counsel refused to put her on the stand.

[52] Fourthly, taking DW1's additional evidence at face value as supplemented by DW3, the trial counsel barely met with the appellant (only once in prison and once more briefly in court). The appellant's counsel made no submissions at the close of the prosecution's case and unfortunately, had passed away such that he could not be present for the decision at the end of defence's case.

[53] *As stated by the Court of Appeal, it does not matter whether the appellant's defence was a weak or a strong one. The crucial point here is that the appellant, accused of a capital crime, should have had his day in court to posit the truth as to the events leading to the charge. The appellant was in essence, actively denied the right to advance his own case by his own counsel. His right to a fair trial had thus been violated.*

[72] Whereas learned deputy public prosecutor in replying to the appellant's submission, relies in the Court of Appeal's decision in *Mohammad Jobi Ullah v Public Prosecutor* [2022] MLJU 1209; [2022] 9 CLJ 37 wherein it was decided as follows:

[57] Counsel for the appellant submitted before us that the appellant's previous counsel, who handled the trial, *was flagrantly incompetent which resulted in the appellant being deprived of a fair trial.* The reasons for this contention were as follows:

(i) the counsel's failure to recall PW1 to establish the appellant's defence that the deceased uttered vulgar words towards the appellant's parents;

(ii) the counsel's failure to engage a Bangladeshi interpreter when the counsel interviewed the appellant in prison. This resulted in the counsel being unable to properly understand the appellant due to the language problem;

(iii) the counsel's failure to recall PW12 to ask him the reason as to why the fact that the vulgar words uttered by the deceased were not stated in D25 although was informed by the appellant; and

(iv) the counsel's failure to ask the appellant during the trial, the specific vulgar words uttered by the deceased towards the appellant's parents.

[58] On this issue, the principle of the law envisaged that to succeed in relying on the incompetency of counsel, it must be shown that there has been flagrant or gross

incompetency that deprived the appellant of a fair trial. This only applies in an extreme situation that causes a miscarriage of justice.

[59] In this regard, the Federal Court in the case of *Shamim Reza Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471; [2009] 6 CLJ 93 explained the principle of law as follows:

> [4] The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v The State* [1994] UKPC 1, where he put the test as follows:
>
> > In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.
>
> [5] What is an 'extreme situation' must depend on the facts of each case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial.
>
> [6] That, then, is the state of the authorities. *In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that: (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice.*
>
> *Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments.*
>
> Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation ... (Emphasis added.)

[60] *In Shamim's case, the contention was that the failure to put to the prosecution's witnesses that the deceased was killed by another person other than the appellant was flagrant incompetence of the counsel as the trial judge declined to consider the line of defence. However, this contention was rejected by the Federal Court as the possibility of another person involved in the killing is so far fetch on the facts of the case and that a reasonable tribunal of fact would have rejected it.*

[61] In assessing the facts, the court, in that case, explained as follows:

> [7] That brings us to the facts of the present case. The real complaint here is focused upon the point that the deceased was killed by some person other than the appellant. It was submitted for the appellant that the failure to put this to the witnesses for the prosecution was flagrant incompetence because it resulted in the trial judge declining to consider that line of defence altogether. With respect, we cannot agree. The evidence makes it clear that no person other than the appellant was in the room at the material time. The room was locked from

A within. This necessitated PW10 to look for the spare key. When she entered, the only person in the room other than the deceased was the appellant himself. The possibility of a third person having entered the room is, on the facts, so far-fetched that a reasonable tribunal of fact would have rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded
B that line of defence has occasioned no miscarriage of justice on the facts of this case.

[8] Having regard to what we have said, we are satisfied that this is not an extreme case of incompetence on the part of counsel. Equally, we are satisfied that this is a case in which the appellant having been properly and deservedly convicted has
C sought to suggest flagrant incompetence on the part of counsel. Before concluding we must say that the trial could perhaps have been conducted with greater competence than that displayed by counsel who appeared for the appellant at his trial. But there was, on the material provided to us, no flagrant incompetence. In any event, no miscarriage of justice has been occasioned. The
D appeal is therefore dismissed. The conviction and sentence are affirmed. (Emphasis added.)

[62] Likewise in the present case, the real complaint was the previous counsel for the appellant had failed to put to the prosecution's witnesses, in particular PW1, PW2, and PW12 about the vulgar words uttered by the deceased towards the appellant's
E parents. However, on the totality of the evidence as alluded to earlier, firstly, the possibility of the deceased uttering the vulgar words is also far-fetched considering the facts, inter alia, that no mention was made of these vulgarities in D25 and the prosecution witnesses were not asked on this issue. In any event, as discussed earlier, even if the deceased did utter the vulgar words, the defence has not established the
F defence of grave and sudden provocation on the balance of probabilities.

[63] Further, on the issue of the language barrier and the counsel's failure to engage a Bangladeshi interpreter when interviewing the appellant in prison, we find it devoid of any merit. The appellant has been staying in Malaysia for 11 years and it is safe inference to be made that the appellant understands the national language.

G [64] In the circumstances, we are of the view that there was no flagrant incompetency on the part of the appellant's counsel that deprived the appellant of a fair trial. We also find that there was no miscarriage of justice occurred in the present case.

H **[73]** The Court of Appeal in *Mohammad Jobi Ullah* found the facts in the Federal Court case in *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414 are poles apart from the facts in the case before them and is of no assistance to the appellant in that case.

I **[74]** With due respect to learned counsel for the appellant, likewise I am of the view that the phrase 'flagrantly incompetent' referred to by the Federal Court in *Yahya Hussein*'s case does apply to our present case.

[75] Firstly, *Yahya Hussein*'s case involves a capital crime as opposed to the

offence in our present case which is theft from the employer and disposing stolen items.

[76] With respect to the failure by the appellant's counsel to cross-examine PW10 and to put his case at the prosecution stage to PW10, I am of the considered view that surely his counsel would have weighed and calculated the pros and cons not to cross-examine PW10 prior to deciding not to do so.

[77] PW10 is one of the of the company's director and an important witness from the company who testified on the company's modus on when and to whom the unwanted or rejected aluminium materials is sold.

[78] His testimony was that he personally makes arrangement for disposal of the aluminium materials for recycling by dealing with 'Ah Xiang' from 'Sykt Ee Fatt' once the appellant informs him the recycling bay is full of aluminium materials to be disposed for recycling.

[79] Furthermore, it was PW10 who gave the mandate to PW11 to lodge the police report against the appellant as evidenced in exh P14.

[80] These facts indicate that there is a strong possibility of any cross-examination of PW10 would only strengthen the prosecution's case especially on the company's modus in disposing the unwanted and rejected aluminium materials for recycling. Surely the appellant's counsel would have borne this in his mind before deciding not to cross-examine PW10.

[81] On the other hand, the least could have been done by counsel for the appellant in the Court below is to put the defence case to PW10. However, I am of the considered view that this by itself is insufficient to accuse the said counsel of being 'flagrantly incompetent' in light of the appellant himself failing to produce any evidence of consent being given by PW10 or by the company to him to make arrangement to dispose the aluminium materials for recycling.

[82] Neither is there any evidence that the appellant had forwarded the monies which he received from the sale of the aluminium materials for recycling to the company.

[83] The glaring evidence from the prosecution's witnesses and CCTV recordings reveals that appellant had acted single-handedly without the company's knowledge and consent in disposing the aluminium materials by making use of the company's employees from the main store and sub store.

[84] The admitted facts and evidence only points to a strong possibility that PW10 could not be easily challenged in his cross-examination.

[85] The appellant's submission on the failure by his counsel to call Min Tun and Ah Xiang does not allude to the relevancy of their testimonies to the appellant's defence.

[86] Min Tun, an employee of the company whose signature appears on the material requisition form had returned to his home country in Myanmar. The prosecution was not able to secure his attendance as a witness. In all likelihood, the appellant too might not able to secure his attendance. Most importantly, the appellant does not mention the relevancy of Min Tun's testimony and how it could have assisted his defence.

[87] As for Ah Xiang, evidence shows Ah Xiang only dealt with PW10 at all times. There is no evidence to show the appellant knew Ah Xiang or dealt with him before. If the appellant does not know Ah Xiang or never dealt with Ah Xiang, therefore I am not able to see the relevancy of Ah Xiang's testimony to the appellant's defence and how it could assist him. In all likelihood, Ah Xiang's evidence will only strengthen the prosecution's case.

[88] Furthermore, in light of the findings made by the learned sessions judge based on the totality of the evidence as I have mentioned earlier, I am unable to see how Min Tun and Ah Xiang's testimony can create a reasonable doubt on the prosecution's case.

[89] As such I find the failure of the appellant's counsel to call Min Tun and Ah Xiang is not an extreme situation amounting to the counsel being 'flagrantly incompetent'.

[90] In the foregoing, I find no merits in this ground of appeal.

GROUND NO 3

[91] Learned counsel for the appellant submits that an adverse inference pursuant to s 114(g) of the Evidence Act 1950 ought to be drawn against the prosecution for failing to call Min Tun and Ah Xiang as witness.

[92] Needless to say, prosecution is solely responsible for deciding how to present its case and choosing which witness to call. In this respect I am guided by the Federal Court's decision in *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 7 CLJ 681 as follows:

> [34] We accept the submission advanced by learned deputy public prosecutor that

the prosecution is solely responsible for deciding how to present its case and choosing which witnesses to call. The dictum of Lord Thankerton in the case of *Adel Muhammed El Dabbah v Attorney General for Palestine* [1944] AC 156 at pp 168–9; [1944] 2 All ER 139 that 'the court will not interfere with the exercise of that discretion, unless, perhaps it can be shown that the prosecutor has been influenced by some oblique motives' has been followed and accepted by our courts. Having said that, we hasten to add that the discretion is not unfettered. The prosecution must exercise his or her power to choose which witness to call consistent with the requirement of fairness. *He or she is under a duty to call all credible witnesses whose evidence is essential to fully presenting the narrative of the case. The obligation to call witnesses is sometimes expressed in terms of the prosecution's duty to call 'material witnesses'*. 'Material' has a wide meaning and in this context, it is evidence which is admissible and capable of influencing the court's assessment of guilt or otherwise is capable of being (see *Dyers v R* [2002] 210 CLR 285; [2002] HCA 45, at para [11]; and *R v Manning* [2017] QCA 23 at para [19]. Unless there is a good reason for not calling the witnesses, prosecutors should call all eye witnesses to the events constituting the alleged offence. (Emphasis added.)

[93] Whereas in respect invocation of an adverse inference for failure by the prosecution to call material witness, Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149 explained the position as follows:

... Anyway, in the context of s 114(g) of the Evidence Act, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in criminal prosecution. *It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it* (see *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105; [1961] 1 LNS 41 (CA), *Adel Muhamed El Dabah v Attorney General of Palestine* [1944] AC 168, *Public Prosecutor v Datuk Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215). However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 19; [1985] CLJ Rep 19, (SC)). Thus, in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149 (Ahmad Maarop FCJ) *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p 229:

> *Nevertheless, the decision of whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution* (Abdullah Zawawi v Public Prosecutor).
>
> Insofar as the trial court is concerned, *its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt* (*Abdullah Zawawi*'s case). (Emphasis added.)

[94] Lastly in the case of *Chua Keem Long v Public Prosecutor* [1996] 1 SLR

510, His Lordship Yong Pung How CJ on calling of number of witnesses had this to say:

> All the prosecution needs to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any should be drawn presumption that the evidence of those witnesses not produced would have been against the prosecution.
>
> In such circumstances, it is also not necessary for the prosecution to offer or make available the remaining witnesses to the defence.

[95] According to the learned deputy public prosecutor, Min Tun had returned to his home country eight months prior to commencement of the trial and the relevant evidence pertaining to the material requisition form was proven through other witnesses mainly PW3 and PW6.

[96] As for failure to call Ah Xiang, I am not able to see the necessity for the prosecution to call Ah Xiang in light of PW10's evidence which is sufficient to establish the company's practice in its usual course of operations which is to dispose the unwanted or rejected aluminium materials for recycling to 'Sykt Ee Fatt' and not to 'Kilang Hup Huat Scrap Metal'.

[97] In any event the prosecution was able to prove through their other witnesses that the company's modus of disposal of the aluminium materials materially differs from the one carried out by the appellant without the company's knowledge.

[98] Next, learned counsel for the appellant also raised the issue of failure by the prosecution to produce the material planning document and as such an adverse inference pursuant to s 114(g) of the Evidence Act 1950 ought to be drawn against the prosecution.

[99] However, I find learned counsel for the appellant does not allude to the relevancy of the material planning document in respect of proving of the charges against the appellant.

[100] The charges against the appellant itself does not mention any quantity of the aluminium materials stolen or disposed.

[101] As for the charges under s 414 of the Penal Code, the important ingredient of the charges was the material date on which aluminium materials disposed by the appellant to Kilang Hup Huat Scrap Metal based on the

purchase bills (exh P9 A-R) issued by PW8's factory for the purchase of the aluminium materials from the appellant.

[102] Whereas as for the charge under s 381 of the Penal Code, the charge was preferred against the appellant based on the available CCTV recording for the period January 2019 to February 2019 (exh P4 (1-19).

[103] According to the learned deputy public prosecutor, the material planning document was never the basis to prove the charges against the appellant. Prosecution's case was collectively based on the material requisition form (exh P1), CCTV recording (exh P4 (1–19)) and the oral evidence of PW1, PW2, PW3, PW4, and PW8 to prove the charges.

[104] Further corroboration to prove the charges against appellant can be found in other documentary evidence adduced by prosecution such as the receipts issued by PW4 for transporting the aluminium materials to PW8's factory (exh P6 A-S), transaction slip (exh P10) and purchase bills (exh P9 A-R) issued by PW8's factory for the purchase of the aluminium materials sold by the appellant.

[105] The learned sessions judge was satisfied based on the totality of the evidence that the appellant had moved the aluminium materials from the factory, got it transported to a recycling factory with the intention of disposing it and benefiting from the same, without the consent from the company.

[106] Therefore, I do not find there is any failure by the learned sessions judge to invoke adverse inferences against the prosecution as submitted by learned counsel for the appellant.

[107] As such, I find there is no merit in this ground of appeal.

GROUND NO 4

[108] Next, appellant submits that the following three matters were not considered by the learned sessions judge:

(a) aluminium which is long in sizes can also be materials for recycling;

(b) failure to prove the shortage of aluminium long in sizes by producing the material planning document; and

(c) that the evidence of PW4 and PW8 is contradictory.

[109] According to the learned deputy public prosecutor, the evidence of PW3 and PW8 reveals that there were aluminium materials long in sizes which can still be used by the company was delivered to PW8's factory.

[110] Prosecution also contends that appellant had no right to dispose any of the company's aluminium materials including the aluminium materials that are long in sizes which was discarded or rejected and the same can only be disposed by the company's director, PW10.

[111] Whereas on the issue of shortage of the aluminium stocks in the sub store not tallying with the company's records, prosecution submits that they are not relying on the material planning document to prove the charges. As stated above, prosecution relies on material requisition form marked (exh P1), CCTV recording (exh P4 (1-19)-CD) and on the totality of the evidence as a whole from the company's employees ie PW1, PW2, PW3 PW5, PW6, PW7, PW9, PW11, its director PW10, the transporter, PW4 and the buyer, PW8.

[112] In any event, as mentioned above the charges against the appellant itself does not mention any quantity of the aluminium materials stolen or disposed.

[113] As for the contradiction between PW4 and PW8' evidence with regards to whether aluminium long in sizes was disposed by the appellant, the learned sessions judge accepted the evidence of PW8 who purchased the aluminium materials from the appellant as PW8 is in in a better position to know the length of aluminium materials purchased by him. Whereas, PW4 was merely the transporter delivering the aluminium materials to PW8's factory.

[114] In the premise, I find no merits in this ground of appeal.

GROUND NO 5

[115] Lastly, learned counsel for the appellant submits that for there to be a conviction pursuant to s 414 of the Penal Code on all the 18 charges against the appellant, the charge under s 381 of the Penal Code must be proven first. He further contends that the charge in the present case only relates to theft for the period January 2019 to February 2019 and therefore the charges under s 414 of the Penal Code that does not fall within this period, is defective and cannot stand.

[116] The 18 charges under s 414 of the Penal Code is for the offence committed during the period 12 February 2018 until 27 February 2019.

[117] In other words, learned counsel for the appellant submits that it is not

possible for the offence pursuant to s 414 of the Penal Code to have been committed prior to the commission of the offence under s 381 of the Penal Code.

[118] In addition, learned counsel for the appellant also submits that one of the elements needs to be proven under s 414 of the Penal Code is that the property which was disposed is a stolen property. He contends that the charges under s 414 of the Penal Code is defective because the date of offence in most of the charges under s 414 of the Penal Code is prior to commission of theft under s 381 of the Penal Code.

[119] Whereas the learned deputy public prosecutor submits in reply that the offence under s 414 of the Penal Code is not dependent on an offence of theft committed by the appellant under s 381 of the Penal Code during the months of January to February 2019. In short, prosecution says s 414 of the Penal Code is a stand-alone section and offence and not dependent on s 381 of the Penal Code.

[120] According to the prosecution, the element which needs to be proven under s 414 of the Penal Code is the act of disposing of the property carried out by the offender on a property which is known or has reason to believe to be stolen property.

[121] The prosecution submits that the appellant has committed the offence under s 414 of the Penal Code when he disposed the stolen property ie the aluminium materials belonging to Sykt Vitally Sdn Bhd by selling these aluminium materials which he had obtained from his employer's premise at the material time to PW8, the owner of Kilang Hup Huat Scrap Centre. According to the prosecution, this was proven by the facts narrated above.

[122] Prosecution further submits that the aluminium materials sold to PW8 still remain belonging to Sykt Vitally Sdn Bhd. Further, the proceeds received by the appellant from the sale of these aluminium materials was kept by the appellant and was never given to the company.

[123] I am in complete agreement with the submissions made by the prosecution. There is no requirement in law that in order to establish an offence under s 414 of the Penal Code, it must be proven first that the appellant committed theft under s 381 of the Penal Code.

[124] I am not able to find any local authorities on this point. However, the decision of the Gujarat High Court in *Hastimal Asaldas v The State of Gujarat* 1975 CriLJ 983 is of assistance on this point. In that case MP Thakkar J noted as follows:

> It is of great significance to realise that Section 414 makes it an offence to render voluntary assistance in regard to concealment, disposal of or making away. The three expressions 'concealing', 'disposing or' or 'making away' have been purposely and deliberately employed. Concealing, means, doing something in a stealthy manner, that is to say, in a manner otherwise than in an open, natural, innocent and frank manner. The expression 'disposing for 'making away' in the context in which it has been used is meant to convey the idea of getting rid with an ulterior motive, that is to say, getting rid of a property not in the normal manner in the usual course of dealings but in a sinister fashion to which criminality can be attributed. And it is in this context that the Legislature has employed the expression 'knowing or having reason to believe the same to be stolen property' in regard to the offender. In other words, it has been made an offence for anyone to render assistance voluntarily, that is to say, with knowledge and consciousness and without any coercion or compulsion. And it has been made an offence to voluntarily render assistance in regard to a property in respect of which he knows that it is stolen' or he has reason to believe that it is stolen. More so when he is rendering this assistance by resorting to some dubious or underhand means in a sinister fashion that is inconsistent with normal innocent conduct not tainted with any criminal significance. *In my opinion, therefore, it is not necessary to establish that the property in respect of which assistance has been rendered in getting rid of the property in a sinister fashion, is stolen property, if it can be established that the offender knew or had reason to believe that it was stolen property. In order to bring home the offence it is not necessary in my opinion for the prosecution to establish that this property was stolen property if it can be shown that there are reasons to believe objectively that the property is stolen property. In such an event it is not necessary to establish from whom the theft was committed, when it was committed, how it was committed and who committed it.* (Emphasis added.)

[125] As such, I do not find any merit in this ground of appeal.

DECISION

[126] In the foregoing, this court finds the conviction on one amended charge under s 381 of the Penal Code and 18 amended charges under s 414 of the Penal Code by the learned sessions judge is safe.

[127] Although the appellant lodged his appeal against both conviction and sentence, however there is no ground of appeal pleaded in his petition of appeal with regards to sentence. Neither was there any written submissions filed nor oral submissions during the hearing pertaining to his appeal against sentence. As such, court takes the position, the appellant has abandoned or does not wish to pursue his appeal on sentence.

[128] In the upshot, all the seven appeals against the decision of the learned sessions judge on 13 October 2021 is hereby dismissed. The convictions and sentences are affirmed.

Appeals dismissed; and convictions and sentences affirmed.

Reported by Ashok Kumar